Filed 7/22/19 Marriage of Martin L & Kayla A. CA4/2

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

In re the Marriage of MARTIN L. and KAYLA A.	
MARTIN L., Appellant, v. KAYLA A., Respondent.	E069307 (Super.Ct.No. IND1400036) ORDER MODIFYING OPINION AND DENYING PETITION FOR REHEARING [NO CHANGE IN JUDGMENT]

We deny appellant's petition for rehearing and modify the opinion filed in this matter on July 3, 2019, as follows:

1. On page 2, first paragraph change "Alexandra, who is now 17 years old" to "Alexandra, who is now 16 years old."
2. On page 18, last paragraph change "(who was by then just shy of her 16th birthday)" to "(who was by then just shy of her 15th birthday)"

Except for this modification, which does not affect the judgment, the opinion remains unchanged.

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SLOUGH
J.

We concur:

CODRINGTON
Acting P. J.

RAPHAEL
J.

Filed 7/3/19 Marriage of Martin L. & Kayla A. CA4/2 (unmodified opinion)

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

In re the Marriage of MARTIN L. and KAYLA A.	
MARTIN L., Appellant, v. KAYLA A., Respondent.	E069307 (Super.Ct.No. IND1400036) OPINION

APPEAL from the Superior Court of Riverside County. Dale R. Wells, Judge. Affirmed.

Martin L., in pro. per., and Richard C. Houghton; Westover Law Group and Andrew L. Westover, for Appellant.

Nikki B. Allen and Rejeanne Eyre for Respondent.

This case involves an ongoing, acrimonious custody dispute between Martin L. and Kayla A. over their youngest daughter, Alexandra, who is now 17 years old. In this appeal, Martin challenges the trial court's rulings on his and Kayla's competing requests for orders (RFOs) regarding Alexandra's custody, education, and extracurricular activities. He argues the court (1) violated his right under Family Code section 217 to present live testimony at the hearing on the requests and (2) abused its discretion in denying his request to modify the initial joint custody order and award him sole legal and physical custody. Finding no error, we affirm the orders.

I

FACTS

A. *Initial Custody Determination*

On the same day in January 2014, Martin filed for separation and Kayla filed for divorce. They had been married for over 20 years and had raised three children together—Noah (already an adult at the time of the petitions), Bella (who was 14), and Alexandra (11). Martin requested joint legal and physical custody of the girls, and alleged Kayla "was alienating the children from him, saying terrible things to them about him and preventing him from having any access to his kids." Kayla requested sole legal and physical custody, and alleged Martin had abused their children.

After an eight-day custody trial, the court (Judge Otis Sterling III) concluded the allegations of abuse were unfounded and that joint legal and physical custody served Bella's and Alexandra's best interests. It ordered Martin and Kayla to equally share

parenting time, on an alternating week basis. The court issued a 36-page statement of decision. It found that during the marriage Martin had shared a relationship with his daughters that was "good and typical of teenage aged girls," but that it started to deteriorate in the winter of 2013. In December 2013, the girls accused Martin of abuse to their therapist and Child Protection Services (CPS). They claimed Martin had pushed Bella to the ground during an argument over what she was going to eat for dinner. Martin denied their account and said Bella had fallen out of her chair when he tried to take away a bag of chips she was clutching to her chest.

The court (and CPS) found Martin the more credible witness and disbelieved the girls' account as embellished. The court noted, however, that the incident had marked a shift in Kayla's and the girls' behavior toward Martin. Bella became "rude, defiant, and would call him names." Kayla, who works at Palm Desert High School (which Bella attended), told her coworkers Martin was the subject of a CPS investigation and told people at Alexandra's dance studio he was on a "child abuse registry." Alexandra, at Kayla's direction, called 911 on Martin when he showed up to one of her dance practices. Kayla proceeded to prevent him from having contact with his daughters for four months, even after she learned CPS had determined the claims of abuse were unfounded. At trial, Kayla testified Martin had physically abused all three of their children at some point (e.g., by pulling hair, spanking, and splashing water too hard in the pool), but the court found her testimony "rang completely hollow"—an attempt "to paint Martin as a physical abuser and thereby better her [custody] position."

The court found there was no substance abuse or physical or mental abuse on either parent's part to warrant deviating from California's preference for shared custody following a divorce. "[N]o information has been presented that persuades this court that equal time with [Martin] would be contrary to the girls' best interest or their health, safety and welfare. If anything, the evidence demonstrates that Kayla has unreasonably and for reasons only she knows, attempted to alienate the children from Martin and interfered with his rights as a parent. She has encouraged and supported the girls in the disrespect of their father and this has been to their detriment." However, the court also found that Martin was not blameless in the deterioration of his relationship with his daughters. "Martin has made decisions of his own accord that have contributed to the alienation of his children's affection away from him." The court noted that professionals who assessed Martin described him as rigid, narcissistic, and immature. One evaluator reported Martin, who is an attorney, "believes he is entitled and smarter than everyone else." The family therapist said Martin's "parenting is often about him and not the girls, he doesn't listen, has poor boundaries and tends to be punitive." The family's rabbi said he "wants total control" and "doesn't understand emotional issues." One of the Evidence Code section 730 evaluators concluded Martin did "not take responsibility for his behavior and how it may contribute to the alienation of his children" and did not "appear to have the skills to . . . nurture a positive relationship" with them.

The court observed the girls enjoyed living with Kayla more than Martin because she was the more relaxed and fun parent, not to mention she had been the primary caregiver during the marriage. But the court also observed it was not its "or any[] other alleged professional's job, absent evidence of abuse and/or neglect, to qualify for parents how they need structure life in their respective homes for their children." In short, the court concluded a parent's personality or likeability is not a proper basis on which to make a custody determination, and awarded equal shared custody to both parents.

B. *Specialized Therapy and the No-Contact Order*

About a year and numerous filings later, Martin requested permission to attend intervention therapy with his daughters to address their alienation from him. He also requested an order prohibiting Kayla from contacting the girls after the therapy and potentially undoing its benefits. The court (now Judge Dale R. Wells) chided the parties for being overly litigious and incapable of resolving their coparenting issues outside court, for their children's benefit.[1] The court said it was having trouble coming up with a workable solution. It believed if it gave Kayla sole custody, it would be rewarding her for her alienating behavior. On the other hand, the court believed, given Martin's "unyielding and domineering personality," if he had sole custody "it's quite possible that he will finish the job that mom started of alienating his kids."

[1] The court also informed Martin it had received numerous complaints from "court reporters, clerks, and CCRCs [Child Custody Recommending Counselors]" that "uniformly state that [Martin's] a bully, that he demeans them, makes demands of them." The court put Martin on notice that if it received any more complaints about him from court staff, it would report him to the state bar association.

After hearing argument from counsel, the court decided to give Martin the opportunity to try to heal his relationship with his daughters. It issued an order directing him to enroll the girls in one of four pre-approved therapy programs. The order awarded him temporary sole legal and physical custody of Bella and Alexandra "for 90 days from their enrollment in [the] program" and prohibited Kayla from having any contact with the girls for "90 consecutive days" from the program's completion.

In October 2016, Martin enrolled in one of the approved programs, the Transitioning Family Program, and the team asked Kayla to participate as well. After the program ended, instead of continuing with Transitioning Family for "after care," father took the girls to New York to start working with Dr. Linda Gottlieb, another approved program. Kayla sought an order ending the no-contact period and Martin sought an order extending it.

In March 2017, the court held a three-day evidentiary hearing on whether to extend or terminate the no-contact order. Martin and Kayla testified and also presented expert testimony. One of Martin's experts, Dr. Steven Miller—who specializes in alienation but had not worked with the family—said protective separation between the children and alienating parent is almost always necessary in cases of severe alienation. Kayla's expert, Dr. Rebecca Bailey, was the creator of the Transitioning Family Program and had worked with the family back in October. She did not think protective separation was necessary in this case, and believed Martin and Kayla could still learn to effectively coparent, particularly if they agreed to use a parent coordinator. "[The girls] have two

good parents that need to be in these girls' lives. Whatever it takes to get them there, it has to happen." She said her program focuses on restorative contact whereas Dr. Gottlieb applies the separation technique. Given the vast differences between the programs, she did not think Martin's decision to switch to Dr. Gottlieb for aftercare was wise. "[I]t is highly unusual to have another program stepping in and saying they're doing after care. That I have never encountered ever. I cannot imagine that in the medical field . . . I can't even fathom how you could do that."

The court said its tentative ruling had been to extend the no-contact order, but it had found Dr. Bailey's testimony compelling and agreed Martin should not have switched to a different program. The court ordered Kayla and Martin to return to the initial custody arrangement of alternating weeks.

Over the next couple months, Martin filed a writ challenging the trial court's refusal to extend the no-contact order, as well as a writ seeking to disqualify Judge Wells. We denied both.

C. *The Current RFOs*

On July 3, 2017, Martin filed an RFO to modify the initial custody determination and award him sole legal and physical custody of Alexandra (Bella had turned 18 the previous month). He also requested no contact or supervised visitation for Kayla until she participated in counseling to address her alienating behaviors. In support, he filed his own declaration, as well as declarations from Dr. Miller and Dr. Gottlieb, who believe alienation is a form of severe child abuse. Martin said a change in custody was necessary

because Kayla continued to engage in behavior that alienated Alexandra from him, and as a result, his daughter was in "serious psychological danger" while in her care. He said he had spent over $600,000 in attorney fees and therapy, and believed the only way to stop the "enormous [emotional and financial] burden" the litigation was causing him was to impose "custody and financial consequences" on Kayla. He cited numerous examples of what he described as Kayla's violation of the custody order and her refusal to appropriately coparent. For example, he said Kayla would pick Alexandra up from school and extracurricular activities when it was his turn to do so; communicate with Alexandra during the 90-day no-contact period; fail to inform him of Alexandra's whereabouts, medical appointments, school absences, etc.; not respond to his emails about Alexandra's activities in a timely manner; and not give him information about Alexandra's friends. He said he and Kayla were unable to agree on which high school Alexandra would attend.

On July 6, 2017, Kayla filed an RFO seeking to (1) unenroll Alexandra from La Quinta High School (where Martin had transferred her) and enroll her in Palm Desert High School, (2) allow Alexandra to participate in Palm Desert High School's dance program, and (3) appoint her minor's counsel. In her declarations supporting her requests and opposing Martin's, Kayla said Martin had transferred Alexandra to La Quinta High School without her knowledge and the school district was refusing to undo the transfer without a court order. She said Palm Desert High School was Alexandra's home school, as she and Martin both lived within its boundaries and Alexandra had attended Palm

Desert Charter Middle School. She said both Alexandra's siblings had gone to Palm Desert, and the friends Alexandra had known since kindergarten were going there. "Alexandra has been through so much change this year, (i.e. her sister going off to college, the back and forth with Court orders, and leaving middle school) that I believe being forced to leave all of her friends will be more than she can cope with." Kayla said she tried to coparent with Martin but he made it difficult by constantly bullying and demeaning her. She also said she had tried to address the alienation issue through the Transitioning Family Program, but Martin switched programs presumably because Dr. Bailey and her team were not giving him the validation he believed he deserved.

At the July 24 hearing, Martin testified on the issue of high school enrollment. He said he had not technically transferred Alexandra to La Quinta High School, but had simply preserved her ability to attend the school by initiating the registration process. Kayla said Martin's actions were equivalent to a transfer because Alexandra was no longer enrolled in Palm Desert. Without deciding which school Alexandra would attend, the court allowed her to participate in Palm Desert's dance "hell week" and team photos, and ordered the family to meet with a Child Custody Recommending Counselor (CCRC). It scheduled a hearing on the RFOs for mid-August, in advance of the high school registration deadline.

The CCRC interviewed Martin and Kayla separately from Alexandra. The counselor described the parents as "highly conflictual" and commented on the "inordinate amount of [court] filings" in their file. She had to end her session with them after only 30

minutes because Martin refused to focus on developing a parenting plan and instead fixated on "child alienation a[s] child abuse." Alexandra told the counselor during her interview she wanted to attend Palm Desert High School. She said she had been dancing since age two, and had successfully auditioned for Palm Desert's dance team at the end of her 8th grade year. Alexandra cried when the counselor informed her Martin had enrolled her in La Quinta High School. She said she thought her father was "obsessed with the alienation issue" and would speak "incessantly" about it "with anyone that will listen." The counselor concluded Alexandra preferred to live with Kayla because Martin was strict.

The counselor recommended awarding sole physical custody to Kayla and joint legal custody to both parents, with the caveat that Kayla make all decisions regarding school enrollment and extracurricular activities. "Given father's history/behavior, as reflected in the [Evidence Code section] 730 Evaluation . . . and the previous [CCRC] memorandum . . . it appears that every decision regarding the minor's involvement in any extracurricular activity will result in father bringing this matter back to court . . . [and] this will be quite embarrassing for [her] at this stage of her development."

The hearing on the RFOs took place on August 15, 2017. At the beginning, the court described for the record a conversation it had just had with the parties in chambers. "I did talk to counsel briefly off the record awhile ago. The purpose of that was to tell them—to give them what time frame they're going to have to work with so that they could kind of plan out their remarks.

"My initial plan was to give . . . [Martin] eight minutes, to give [Kayla] ten minutes so she can respond to his eight plus whatever she wanted to say, and then to give [Martin] two minutes to respond.

"[Martin's counsel] said he needed more time than that. I wound up saying that I would give [him] 15 minutes, [Kayla] 20 minutes, and then [Martin] an additional five minutes, which makes a total of 40 minutes between the two sides for argument."

The court asked Martin's counsel if he had anything to add, prompting counsel to state: "I had requested an hour [for argument], and I also had reminded the Court that my client would be entitled to an evidentiary hearing, but we wanted to use—instead of doing that, to go forward and use the time for argument, and the Court indicated that it wouldn't give us any more time than what the Court's just indicated, nor allow us to have an evidentiary hearing." The court replied, "I'm not going to allow an evidentiary hearing. We've had evidentiary hearings coming out the wazoo in this case. This is an RFO—it's two RFOs actually . . . I've reviewed the pleadings, and I'm ready to proceed on it." The court then asked Martin's counsel, "[W]as there anything else you wanted to put on the record before I start your time?" Counsel asked the court to take judicial notice of various documents in the court's file, and the court granted his request.

The parties proceeded to oral argument. Martin's counsel spent the majority of his time recounting the history of the case and the findings from the initial custody trial. He argued Martin deserved sole custody because Kayla was unwilling to coparent and the court should "give preference to the parent who is willing to share." "Martin—this is the

first time he's asked to take any custody away from her because he's always had the hope that somehow they would be able to share, but the record is absolutely replete that she just won't do it."

Kayla's counsel argued Martin had not shown a change of circumstances to warrant modifying the initial custody determination. She also argued Martin had violated a court order by unilaterally transferring Alexandra to La Quinta High School, and that he "spends all of his time and energy . . . raising the alienation flag" rather than trying to coparent with Kayla.

In rebuttal, Martin's counsel argued if the court accepted "any of this science on parental alienation," it would find "that kids don't reject parents," it takes an alienating parent to cause the damage.

The court concluded neither Martin nor Kayla had "behaved in an exemplary manner." It denied Martin's RFO (leaving the joint custody order in place), and granted Kayla's RFO in part—allowing Alexandra to attend Palm Desert High School and to participate in the dance program, but refusing to appoint her counsel. In addition, the court found it necessary to give Kayla "final decision-making authority regarding education and extracurricular activities" because Martin had unilaterally transferred Alexandra to La Quinta High School. "That means the parties consult. They meet; they confer; they try to reach an agreement. If they cannot reach an agreement, mom gets the deciding vote on education and extracurricular activities." Martin timely appealed.

II

ANALYSIS

Martin argues the court violated Family Code section 217 when it refused to let him testify or cross-examine Kayla at the hearing on their RFOs. He also argues the court abused its discretion by denying his request to modify the joint custody order and award him sole custody of Alexandra. We disagree on both points.

A. *General Principles*

Family Code section 3087 allows a parent to request modification of a joint custody order. "An order for joint custody may be modified or terminated upon the petition of one or both parents or on the court's own motion if it is shown that the best interest of the child *requires* modification or termination of the order. If either parent opposes the modification or termination order, the court shall state in its decision the reasons for modification or termination of the joint custody order." (Fam. Code, § 3087, italics added; unlabeled statutory citations refer to this code.)

The California Supreme Court described the framework for granting such a custody modification in *In re Marriage of Brown & Yana* (2006) 37 Cal.4th 947 (*Marriage of Brown*). "California's statutory scheme governing child custody and visitation determinations is set forth in the Family Code. . . . Under this scheme, 'the overarching concern is the best interest of the child.' [Citation.] [¶] For purposes of an initial custody determination, section 3040, subdivision (b), affords the trial court and the family '"the widest discretion to choose a parenting plan that is in the best interest of the

child.”’ [Citation.] When the parents are unable to agree on a custody arrangement, the court must determine the best interest of the child by setting the matter for an adversarial hearing and considering all relevant factors, including the child’s health, safety, and welfare, any history of abuse by one parent against any child or the other parent, and the nature and amount of the child’s contact with the parents. [Citations.] [¶] Once the trial court has entered a final or permanent custody order reflecting that a particular custodial arrangement is in the best interest of the child, ‘*the paramount need for continuity and stability in custody arrangements*—and the harm that may result from disruption of established patterns of care and emotional bonds with the primary caretaker—*weigh heavily in favor of maintaining’ that custody arrangement*. [Citation.] In recognition of this policy concern, we have articulated a variation on the best interest standard, known as the *changed circumstance rule*, that the trial court must apply when a parent seeks modification of a final judicial custody determination. [Citations.] Under the changed circumstance rule, custody modification is appropriate *only if the parent seeking modification demonstrates ‘a significant change of circumstances’ indicating that a different custody arrangement would be in the child’s best interest.* [Citation.] Not only does this serve to protect the weighty interest in stable custody arrangements, but it also fosters judicial economy.” (*Id*. at pp. 955-956, italics added.)

“The changed-circumstance rule is not a different test, devised to supplant the statutory test, but an adjunct to the best-interest test. It provides, in essence, that once it has been established that a particular custodial arrangement is in the best interests of the

child, the court need not reexamine that question. Instead, it *should preserve the established mode of custody* unless some significant change in circumstances indicates that a different arrangement would be in the child's best interest[s]." (*F.T. v. L.J.* (2011) 194 Cal.App.4th 1, 15, quoting *Burchard v. Garay* (1986) 42 Cal.3d 531, 534.)

"The standard of appellate review of custody and visitation orders is the deferential abuse of discretion test." (*In re Marriage of Burgess* (1996) 13 Cal.4th 25, 32.)

B. *Family Code Section 217*

Section 217 requires a court to hear "relevant" live testimony "within the scope of the hearing" when offered by the parties. (§ 217, subd. (a).) If the testimony is from a *nonparty* witness, the party seeking to present it must "file and serve a witness list with a brief description of the anticipated testimony" prior to the hearing. (§ 217, subd. (c).) A court may refuse live testimony only if it finds good cause for doing so and states its finding "on the record or in writing." (§ 217, subd. (b).) Rule 5.113 of the California Rules of Court requires trial courts to consider several factors in making a finding of good cause, including whether "a substantive matter is at issue—such as child custody," whether "material facts are in controversy," whether live testimony "is necessary for the court to assess the credibility of the parties or other witnesses," and any other "just and equitable" factor. (Cal. Rules of Court, rule 5.113(b)(1), (2) & (3), unlabeled rule citations refer to these rules.) "If the court makes a finding of good cause to exclude live testimony, it . . . is required to state only those factors on which the finding of good cause

is based." (Rule 5.113(c).) Like other rights, "the right to live testimony may be forfeited." (*In re Marriage of Binette* (2018) 24 Cal.App.5th 1119, 1127 [failure to request to testify forfeited right]; *Mendoza v. Ramos* (2010) 182 Cal.App.4th 680, 687 [same].)

We conclude Martin forfeited his right to present live testimony. When the issue arose at the beginning of the hearing, his counsel said he had "reminded the Court that my client *would be entitled* to an evidentiary hearing, but we wanted to . . . *instead of doing that*, to go forward and *use the time for argument*." (Italics added.) When the trial court replied that there had already been enough hearings on the custody issue and asked Martin's counsel if he wanted to put "anything else" on the record, counsel did not object to the lack of an evidentiary hearing, he moved on to the topic of judicial notice. This exchange reveals Martin did not request to testify or cross-examine Kayla but instead made a strategic decision to use his right to present live testimony as leverage for seeking more argument time, which he obtained.

In any event, even if Martin had asked to testify and cross-examine Kayla, we would conclude the court satisfied section 217 by stating on the record its finding of good cause for refusing live testimony from the parties. (Fam. Code, § 217, subd. (b).) The court told Martin and Kayla it did not need to hear their testimony because there had already been plenty of live testimony and it was ready to proceed on the filings. In other words, it had determined additional live testimony was "[un]necessary . . . to assess the[ir] credibility"—one of the reasons a court may refuse live testimony under the

California Rules of Court. (Rule 5.113(b)(3).) And that determination is supported by the record. Judge Wells was familiar with Martin and Kayla from their numerous court appearances. He had personally observed both of them testify on alienation, coparenting, and schooling decisions a few months earlier at the March 2017 hearing, and he had reviewed the Evidence Code section 730 evaluations, custody trial, and statement of decision. By that point in the litigation, the court had sufficient information about Martin's and Kayla's credibility to decide their RFOs on the basis of their declarations.

But even if Martin hadn't forfeited the issue and even if the court had violated section 217, Martin has not demonstrated the error was prejudicial. He has not identified, for the trial court or this court, what evidence he would have presented through his or Kayla's live testimony that would have been different from the testimony in their declarations.[2] (*Magic Kitchen LLC v. Good Things Internat., Ltd.* (2007) 153 Cal.App.4th 1144, 1165 ["a specific offer of proof is necessary in order to preserve an evidentiary ruling for appeal"]; *In re Marriage of Shimkus* (2016) 244 Cal.App.4th 1262, 1269 ["Under Code of Civil Procedure section 475, we may not reverse a judgment unless an error was prejudicial and a different result was likely in the absence of the error. Prejudice is not presumed. And it is not our responsibility to comb through the record to locate possible errors"].)

[2] Martin also filed a writ alleging the trial court violated section 217 (E069296), which we will decide by a separate order.

We are similarly unpersuaded by Martin's claim the court abused its discretion by refusing to give his counsel an hour for oral argument. Martin claims the allotted 20 minutes was insufficient to adequately address the "35 issues" his counsel was prepared to discuss. Trial courts enjoy "great latitude in controlling the duration and limiting the scope of [argument]." (*People v. Edwards* (2013) 57 Cal.4th 658, 743.) That the trial court did not share Martin's view of the number and complexity of the issues at stake is not an abuse of discretion. The court gave counsel sufficient time to address the issues involved in the two RFOs.

C. *Refusal to Modify the Joint Custody Order*

Martin argues no reasonable judge could deny him sole custody in the face of his experts' declarations that parental alienation is a form of child abuse and the evidence of Kayla's numerous violations of court orders. We conclude the court properly denied Martin's RFO because he failed to satisfy his evidentiary burden.

As noted above, the need for continuity and stability in custody arrangements is "paramount." (*Marriage of Brown, supra,* 37 Cal.4th at p. 956.) To justify disrupting the living arrangement that Alexandra (who was by then just shy of her 16th birthday) had known for the previous two years, Martin had to demonstrate there had been "some significant change in circumstances" that made living with him fulltime in her best interest. (*F.T. v. L.J., supra,* 194 Cal.App.4th at p. 15.)

Martin did not demonstrate a change of circumstances. Instead, the evidence he and Kayla presented to the court showed their family's dynamics had, unfortunately, not changed since the custody trial—Alexandra was still not getting along with Martin and preferred to live with Kayla, Kayla was not making efforts to teach Alexandra to respect Martin, and Kayla and Martin were still having difficulty coparenting. Martin argues Kayla committed "the ultimate form of child abuse" by alienating Alexandra from him, but he ignores the evidence of his own role in pushing Alexandra away. The trial court was free to credit Dr. Bailey's opinion that both Martin and Kayla needed to be in Alexandra's life over Martin's experts' opinions that Kayla's behavior constituted emotional abuse. Because Martin did not show his family's circumstances had significantly changed over the two years since the custody trial, he gave the trial court no reason to disrupt Alexandra's life by altering the custody status quo.

As a final point, we disregard Martin's claim—raised for the first time in his reply brief—that the court abused its discretion in awarding Kayla final authority to make decisions regarding Alexandra's schooling and extracurricular activities. As a general matter "we do not consider arguments raised for the first time in a reply brief," and Martin has given us no reason to depart from this practice. (*People v. Mickel* (2016) 2 Cal.5th 181, 197; *Reichardt v. Hoffman* (1997) 52 Cal.App.4th 754, 764 [making new arguments in a reply brief "deprive[s] the respondent of an opportunity to counter"].)

III

DISPOSITION

We affirm the trial court's orders. Martin shall bear Kayla's costs on appeal.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

SLOUGH
J.

I concur:

RAPHAEL
J.

[*In re the Marriage of Martin L. and Kayla A.*, E069307]

Codrington, J., Concurring.

I agree with the majority's conclusion affirming the trial court's orders, but respectfully disagree with the portions of the majority opinion which conclude Martin forfeited his right to present live testimony and "the court satisfied section 217 by stating on the record its finding of good cause for refusing live testimony from the parties." (Fam. Code,[1] § 217.) (Maj. opn. *ante*, at p. 16.)

The record indicates that Martin did in fact request an evidentiary hearing, asserting that there was new evidence. Nonetheless, the court refused to allow such a hearing. Specifically, Martin's counsel stated: "I had requested an hour, and I also had reminded the Court that my client would be entitled to an evidentiary hearing, but we wanted to use—instead of doing that, to go forward and use the time for argument, and the Court indicated that it wouldn't give us any more time than what the Court's just indicated, nor allow us to have an evidentiary hearing." (Maj. opn. *ante*, at p. 11.) Immediately thereafter, the court explicitly responded, "*I'm not going to allow an evidentiary hearing*." (Maj. opn. *ante*, at p. 11, italics added.) It is well settled that "argument" is not evidence. Moreover, Martin's request to testify or cross-examine Kayla would have been futile once the court stated it would not hold an evidentiary hearing and asked Martin's counsel if he wanted to put "anything else" on the record

[1] All future statutory references are to the Family Code unless otherwise stated.

before the court started counsel's time. (Maj. opn. *ante*, at p. 11.) Thus, under the circumstances, I cannot find Martin forfeited his right to present testimony, new evidence, or cross-examine Kayla.

I also respectfully disagree with the majority opinion finding the court satisfied section 217 by stating on the record its finding of good cause for refusing to conduct an evidentiary hearing. The court never stated the specific reasons supporting its good cause finding on the record or in writing as required by section 217. The court merely stated, "We've had evidentiary hearings coming out the wazoo in this case" and it had "reviewed the pleadings" and it was "ready to proceed on it." (Maj. opn. *ante*, at p. 11.) It is undisputed that the trial court was familiar with the case history. However, this comment does not describe or state the specific factors the court considered in making its finding of good cause in compliance with California Rules of Court, rule 5.113(b).

As noted, section 217, in relevant part, provides: "(a) At a hearing on any order to show cause or notice of motion brought pursuant to this code, absent a stipulation of the parties or a finding of good cause pursuant to subdivision (b), the court *shall* receive any live, competent testimony that is relevant and within the scope of the hearing and the court may ask questions of the parties. [¶] (b) In appropriate cases, a court may make a finding of good cause to refuse to receive live testimony *and shall state its reasons for the finding on the record or in writing*. The Judicial Council shall, by January 1, 2012, adopt a statewide rule of court regarding the factors a court shall consider in making a finding of good cause." (Italics added.) It is helpful for the reviewing court and the

parties when a trial court's conclusions supporting its findings are stated on the record or in writing.

The Judicial Council adopted California Rules of Court, rule 5.113(b), which lists the factors a court must consider in making a finding of good cause, effective January 1, 2013. Rule 5.113(b), provides: "(b) Factors [¶] In addition to the rules of evidence, a court must consider the following factors in making a finding of good cause to refuse to receive live testimony under Family Code section 217: [¶] (1) Whether a substantive matter is at issue—such as child custody, visitation (parenting time), parentage, child support, spousal support, requests for restraining orders, or the characterization, division, or temporary use and control of the property or debt of the parties; [¶] (2) Whether material facts are in controversy; [¶] (3) Whether live testimony is necessary for the court to assess the credibility of the parties or other witnesses; [¶] (4) The right of the parties to question anyone submitting reports or other information to the court; [¶] (5) Whether a party offering testimony from a non-party has complied with Family Code section 217[, subdivision] (c); and [¶] (6) Any other factor that is just and equitable." (Cal. Rules of Court, rule 5.113(b), bold omitted.) Rule 5.113(c), states: "(c) Findings [¶] If the court makes a finding of good cause to exclude live testimony, it must state its reasons on the record or in writing. The court is required to state only those factors on which the finding of good cause is based." (Cal. Rules of Court, rule 5.113(c), bold omitted.)

"The purpose of section 217 is to encourage reliance on live, rather than written, testimony in family law proceedings." (*In re Marriage of Binette* (2018) 24 Cal.App.5th 1119, 1126-1127.) It is challenging to do so in cases where the parties are acrimonious. However, I agree with the majority that the court is not required to set forth its conclusion as to each of the factors listed in rule 5.113(b). The court is "required to state only those factors on which the finding of good cause [was] based." (Cal. Rules of Court, rule 5.113(c).)

Based on the foregoing, the court did not make a sufficient finding of good cause, or if it did, it did not state its reasons for the finding on the record under the circumstances of this case. Although the court was familiar with the case and had personally observed both Martin and Kayla testify at the earlier March 2017 hearing, the court did not specifically state on the record that additional live testimony was "[un]necessary . . . to assess the[ir] credibility" (Cal. Rules of Court, rule 5.113(b)(3)), or that there were no material facts in controversy (rule 5.113(b)(2)), or any other factor which is "just and equitable" (rule 5.133(b)(6)). The court never stated what its reasons were for denying the evidentiary hearing "on which the finding of good cause [was] based." (Rule 5.113(c).)

Even though I believe the issue had not been forfeited and the court had not stated the factors upon which it relied, I agree with my colleagues that Martin has not met his burden of establishing the error was prejudicial. Therefore, the error is harmless. For these reasons, I concur in the disposition.

CODRINGTON
Acting P. J.